

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 03-10501-WRS

Chapter 7

COLLINS SIGNS, INC.,

Debtor.

MEMORANDUM DECISION

This Chapter 7 case is before the Court on three separate applications to employ counsel for the Trustee: (1) application to employ Charles Nick Parnell and D. Lewis Terry, Jr., as counsel to prosecute certain actions to avoid preferential transfers (Doc. 645); (2) application to employ William S. Stone, Harry P. Hall, II, and Brent L. Crumpton, as counsel to litigate the estate's claim against Nissan Motor Acceptance Corporation (Doc. 649); and (3) application to employ Von G. Memory as counsel for the Chapter 7 Trustee. (Doc. 826). By its order of April 30, 2004, the Court has previously approved the employment of William S. Stone, and requested briefing on the remainder of the applications. (Doc. 864). These applications have prompted several objections. (Docs. 849, 853, 857, 875, 876, 880). The proposed counsel have filed several memoranda in support of their positions. (Doc. 851, 877, 878, 879). For the reasons set forth below, the applications to employ Charles Nick Parnell, D. Lewis Terry, Jr., and Von G. Memory are DENIED. The Court's ruling on the application to employ Harry P. Hall, II and Brent L. Crumpton is DEFERRED, pending the consideration of amended affidavits, as set forth in more detail below. The Court will divide its discussion into three parts, as follows: (I) Parnell and Terry; (II) Memory; and (III) Hall and Crumpton.

I. PARNELL AND TERRY

The Trustee seeks to employ Charles Parnell (“Parnell”) and Lewis Terry (“Terry”) to prosecute various adversary proceedings to collect money due to the estate for voidable preferences and to collect accounts receivable. (Doc. 645). Parnell previously represented Ken-Mac Metals, Inc., one of the petitioning creditors in this case.¹ Ken-Mac Metals objects to Parnell’s employment, citing a conflict of interest as well as other objections. (Doc. 853).

Applications to employ professional persons are governed by the provisions of 11 U.S.C. § 327(a), which provides as follows:

Except as otherwise provided in this section, the trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.

When one applies this statute to the facts of the instant case, it is apparent that Parnell is not disinterested and for this reason, he may not be retained by the Trustee. Ken-Mac Metals was a petitioning creditor, whose interests are adverse to the estate. In addition, Ken-Mac Metals is named as a defendant in the civil action styled Collins Signs, Inc. v. Nissan North American, Inc., et. al., Civil Action No. 04-W-267-S, in the United States District Court for the Middle District of Alabama. Based upon representations made at a number of hearings, this civil action is potentially the largest asset

¹ This bankruptcy case was commenced as an involuntary bankruptcy proceeding pursuant to 11 U.S.C. § 303. (Doc. 1). Parnell entered an appearance on behalf of Ken-Mac Metals. (Doc. 3).

of the estate. Because the interests of Ken-Mac Metals and the estate are adverse, it would be inappropriate for Parnell to represent Trustee as he has previously represented Ken-Mac Metals.

Terry represents Personnel Resources, a creditor, as well as the Unsecured Creditors Committee. (Doc. 224). Objections to Terry's employment have been filed by both Ken-Mac Metals and Nissan. (Docs. 849, 853). Representation of a creditor does not disqualify counsel unless there is an objection from at least one creditor and an actual conflict of interest. 11 U.S.C. § 327(c). The question becomes whether there is an actual conflict of interest. The Court has spent a considerable amount of time on this case and is of the view that it has an understanding of the interests of the various parties in interest as well as the dynamics of this situation. Having considered the record in this case, and taking into account the knowledge gained from several hearings previously held, the Court is of the view that there are two possibilities for a conflict. First, by representing a creditor and the Creditor's Committee, Terry's judgment as to which parties are sued, and under which theories, may reasonably be questioned. An impartial observer might question whether Terry would be partial to his client, or those parties with whom he worked as counsel for the Creditor's Committee. Second, to the extent that Terry might have input as to the estate's litigation position or settlement position on the Nissan litigation, one might reasonably question whether he would be even handed with respect to all of the many named defendants. Given these real and unsettled questions, the Court finds that there is an actual conflict of interest.

For the reasons set forth above, the applications to employ both Parnell and Terry are DENIED.

II. VON G. MEMORY

The Trustee seeks to retain Von Memory (“Memory”) to assist her in the Nissan litigation, citing his bankruptcy expertise. (Doc. 826). This application is made pursuant to 11 U.S.C. § 327(a). Memory previously represented John L. Collins (“Collins”), the former owner and president of the Debtor corporation. Memory represents in his declaration that Collins has waived any conflict of interest. Nissan has filed an objection to the application. (Doc. 875). The Bankruptcy Administrator recommends that the application be granted. (Doc. 850).

Nissan contends that Memory has a conflict of interest, claiming that Nissan is likely to file a cross claim against Collins in the civil action now pending in District Court. Moreover, at the evidentiary hearing held March 18, 2004, Nissan produced substantial evidence to the effect that arguably fraudulent or improper transfers may have been made to Collins by the Debtor corporation during the months prior to the bankruptcy filing. The interests of the estate and Collins are, quite clearly, adverse.

There is undoubtedly a conflict of interest between the estate and Collins in this case. This conflict has been waived by both parties. Rule 1.9 of The Alabama Rules of Professional Conduct permits such waivers. The objection made by Nissan, who is the lead defendant in a suit brought by the Trustee, might strike one who has not been steeped in the intricacies of the Bankruptcy Code and the Bankruptcy Rules as anomalous. In the world outside of bankruptcy practice, a defendant usually is not given any say in who represents the plaintiff. As Nissan is a party in interest it has rights equal to

those of any other party in interest in this Chapter 7 bankruptcy case.² While a conflict of interest may be waived under the Rules of Professional Conduct, the requirement of disinterestedness under the Bankruptcy Code may not.³ In effect, the Defendant has been permitted to disqualify an otherwise qualified lawyer whose services the Trustee believes would be beneficial to the estate. This result may seem anomalous, nonetheless the Court finds that Memory is not disinterested within the meaning of Section 327(a), and for this reason he may not be employed by the Trustee. See also 11 U.S.C. § 101(14) (defining the term “disinterested person”).

III. CRUMPTON AND HALL

The Trustee seeks to employ Brent Crumpton (“Crumpton”), Harry Hall (“Hall”) and William Stone (“Stone”), pursuant to 11 U.S.C. § 327(e), to represent her for a specified, special purpose,

² The Court is aware that one may question whether any party in interest, other than the Bankruptcy Administrator, has standing to object to employment of counsel for the Trustee. The Bankruptcy Rules do not require that parties in interest be given notice of an application for employment. See FED. R. BANKR. P. 2002, 2014. Moreover, the Court is not required to hold a hearing. Even the language used in the Rules, referring to this as an “application” rather than a “motion,” suggests that parties in interest, other than the Bankruptcy Administrator, may not have the right to object to applications for employment. See 28 U.S.C. § 586(a)(3)(H). Nevertheless, the Court is of the view that it is better to permit objections to employment, rather than leave any issue unresolved until an application for payment of fees is presented. As parties in interest may object to applications for the payment of professional fees, the better practice is to permit objections to employment, thereby heading off potential problems in advance, avoiding a forfeiture of fees.

³ The Court can foresee another problem which could well arise in this case if a fraudulent conveyance suit were to be brought by the Trustee against John Collins. Even if Memory had no part in the suit, he and the Trustee would still be subject to a charge by his former client that he transmitted confidential information to the Trustee, in violation of Rule 1.9(b) of the Alabama Rules of Professional Conduct. The Court would then be called upon to “suppress” the allegedly wrongfully disclosed information. This potential problem would increase exponentially the complexity of any suit which may be brought against John Collins.

which is to prosecute the civil action against Nissan, and others, which was recently filed in District Court. (Doc. 649). Crumpton, Hall and Stone were previously employed by the Debtor, prior to the conversion of this case, when the case was pending under Chapter 11. (Doc. 225, as amended, Doc. 330). Ken-Mac Metals objects to this application. (Doc. 853).

The Court is concerned with the disclosures filed by Crumpton and Hall. To say the least, the Court was dismayed to learn that the Trustee has recently brought suit against Crumpton and Hall to avoid certain transfers made to them.⁴ It does not appear that any of the payments which gave rise to the Trustee's Adversary Proceedings were disclosed in the affidavits filed with the application.

Bankruptcy Rule 2014(a) provides, in part, that:

The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants . . .

FED. R. BANKR. P. 2014(a).

In an affidavit dated April 1, 2004, Hall states that "it should be emphasized that LEWIS, BRACKIN, FLOWERS & HALL has represented one or more creditors listed in the Collins Signs, Inc., bankruptcy. However, the engagement or engagements referenced were unrelated to the instant bankruptcy." (Doc. 649, Ex. 2). Hall should set forth with specificity, all of his connections and permit the Court and other interested parties to arrive at their own conclusions as to whether he is disinterested

⁴ See Susan S. DePaola, Trustee v. Brent L. Crumpton, P.C., Adversary Proceeding No. 04-1067; Susan S. DePaola, Trustee v. Lewis, Brackin, Flowers & Hall, Adversary Proceeding No. 04-1110.

or not. Instead, Hall has disclosed that there are connections, without elaborating, and then offers the conclusion that they are unrelated, thereby denying the Court the opportunity to examine his claim.

As for the payments received by Hall and Crumpton, the date and amount of any such payment, received at any time after that date which is six months before the date of the bankruptcy petition, should be disclosed along with a reasonably complete description as to why each such payment was made. Section 327(e) permits the Trustee to retain lawyers who hold or represent interests which are adverse to the estate so long as there is no interest which is adverse with respect to the matter for which the professional is to be employed. 11 U.S.C. § 327(e).

The Court will defer its ruling on the application to employ Hall and Crumpton and permit them an additional 15 days to submit complete affidavits, setting forth with specificity, all of their connections, as that term is used in Rule 2014(a). They should also disclose all payments received after that date which is six months before the date of the petition.⁵ Copies of the affidavits shall be served upon the Bankruptcy Administrator as well as counsel for Nissan and Ken-Mac Metals. Any party in interest may file an objection within 15 days after service of the amended affidavits. The Court will then take the application to employ Hall and Crumpton under advisement.

Done this 28th day of May, 2004.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Susan S. DePaola, Trustee
Teresa R. Jacobs, Bankruptcy Administrator

⁵ The petition in this case was filed on March 4, 2003. Therefore, payments received at any time on or after September 4, 2002, should be disclosed.

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